IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1099 OF 2004

Babasaheb Jagannath Nimbalkar ...Appellant
vs.
Nandabai Madhukar Nimbalkar & Ors. ...Respondents

Mr.P.B.Shah for the Appellant
Mr.Suresh M. Sabrat for Respondent Nos.1 and 2.

CORAM: A.S.OKA,J.
DATE : MARCH 31, 2005.

P.C.:

1. Heard Counsel appearing for the parties. The appeal is by the original Defendant No.1. It is not in dispute that the parties are closely related. The Respondent No.1-Plaintiff No.1 is widow of deceased Madhukar. The Respondent Nos.2 and 3 are the daughters of the Respondent No.1 who were admittedly minors on the date of execution of the sale deed in favour of the Appellant. The Respondent No.1-original Plaintiff No.1 acting as a manager of the joint Hindu family for herself and her minor daughters purpoted to execute the sale deed dated 5th December 1985 in favour of the present Appellant-Defendant No.1. It is not in dispute that daughters of Respondent No.1 viz. Respondent Nos.2 and 3 were minor on the date of execution of the sale deed. The Respondent Nos.1 and 2 filed a suit for declaration and possession by contending that the sale deed dated 5th December 1985 is without consideration. The contention raised in the plaint is that the Appellant is the nephew of the Respondent No.1. It is stated in the plaint that the signature of the Respondent No.1 was obtained by the

Appellant and thereafter the Respondent No.1 was driven out by the Appellant. As a result of which the Respondent No.1 was required to reside in her sister's house. The case of the Respondent No.1 is that the sale deed is sham and bogus.

2. The Respondent No.3 who is the Defendant No.2 appears to have supported the Appellant in the Trial. The Trial Court recorded a finding that the Respondent Nos.1 and 2 established that no consideration was paid by the Appellant. It is not in dispute that there was no permission granted by the Competent Court in favour of the Respondent No.1 for selling the property on behalf of her minor daughters. The Appellate Court has confirmed the findings of the Trial Court regarding failure to pay the consideration.

3. Shri Shah appearing for the Appellant submitted that the burden was on the Respondent No.1 to prove that consideration was not paid to her. She has not discharged the said burden. He submitted that as one of the daughters has supported the Appellant and as the sale deed is admittedly executed by the Respondent No.1, the Appellant has become owner of the two third share. The learned Counsel for the Respondent Nos.1 and 2 supported the impugned Judgment and Decree.

4. The Respondent No.1 has stepped into witness box and denied to have received consideration. She has narrated the circumstances under which the sale deed was got executed. The

Trial Court and the Appellate Court have referred to oral evidence of parties and witnesses Shankar Jagganath Chavan and Dattatraya Sahebrao Kadam examined by the Appellant.

5. The Appellate Court has recorded a categorical finding that the pleading of the Appellant and evidence led by the Appellant was at variance as regards place and date of payment of consideration. After considering the oral and documentary evidence on record, the Courts below have accepted the case made out by the Respondent No.1 on oath that she did not receive any consideration. The findings of the Courts below are purely findings of fact recorded on appreciation of oral and documentary evidence on record. The husband of the Respondent No.1 died in the year 1980 and in the year 1985 her nephew (son of husband's brother) has obtained the sale deed from her. Even assuming that some other view is possible to be taken on the basis of the evidence, it is not permissible to do so in a Second Appeal under Section 100 of Code of Civil Procedure, 1908.

6. Once it is established that the sale deed was executed without consideration, the fact that in the suit one of the daughters who has attained majority has supported the Appellant, is of no consequence. The question is whether the right, title or interest of the Respondent Nos.1 to 3 is passed on the Appellant. If the sale deed is vitiated because of want of consideration, the Appellant cannot claim any

right, title or interest.

7. Therefore, no fault can be found with the decree of declaration and possession passed by the Trial Court and confirmed by the Appellate Court. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

8. At this stage, Shri Shah for the Appellant submitted that ad-interim relief which was in operation be extended for a reasonable period. The said request is opposed by the learned Counsel for the Respondent Nos.1 and 2. Considering the fact that ad-interim relief was granted by this Court, the same will continue to operate for a period of six weeks from today.

JUDGE.